UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 99-43-B
	)	
DAVID L. COOK	)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO SUPPRESS

On June 8, 1999, a grand jury indicted Defendant for possession of child pornography in violation of 18 U.S.C. §2252A(a)(5)(B), and for knowingly transporting child pornography in violation of 18 U.S.C. §2252A(a)(1). Defendant now moves to suppress the materials seized from his residence on December 15, 1998. Further, the Defendant seeks to suppress statements he made to law enforcement officials on December 15, 1998. The Court conducted an oral hearing on the issues raised in Defendant's motion on September 10, 1999. For the reasons stated below, I recommend that the Court DENY Defendant's motion to suppress.

FACTS

After serving nearly four years in prison for rape, gross sexual misconduct, and unlawful sexual contact, the state released Defendant and placed him on probation. Upon Defendant's release his state probation officer, Randy Brown,

went over several probation conditions. Although one of the probation conditions Defendant agreed to directed him "to answer all reasonable inquiries by the probation officer" and permitted home visits by the officer, it appears Brown conducted few, if any, home visits.

That changed when the state, upon receiving a three-year federal grant, hired six probation officers to monitor only previous sex offenders. In March or April 1998, William Jones became Defendant's probation officer and upon reviewing Defendant's file became concerned that Defendant had stopped going to counseling sessions, a violation of one of Defendant's probation conditions.[1] Defendant told Jones that he had stopped going to counseling sessions because of financial problems. As a result, Jones arranged for Defendant to pay past payments he owed to the counselor so that he could resume counseling.

Unlike Defendant's previous probation officers, Jones began home visits with Defendant. Jones conducted about five to six home visits during the time he was Defendant's probation officer. Although Defendant expressed surprise at Jones's first home visit, he was cordial during that and subsequent visits.

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[1] At oral argument both the government and Defendant spent a considerable amount of time regarding whether Defendant's attendance at Sex and Love Addicts Anonymous (SLAA) meetings were sufficient to meet the counseling condition. The Court need not address this issue because Defendant stated at the hearing that he had stopped attending the SLAA meetings before Jones became his probation officer.

Basically, a home visit consisted of Jones knocking on the door and asking Defendant if he could come in and speak with him. Sometimes during the home visit Jones would ask if he could look around Defendant's residence. Defendant never objected to Jones conducting a search of the residence. Jones's search covered Defendant's bedroom, drawers, and other living areas in Defendant's residence. At no time did Jones ever threaten to revoke Defendant's probation if he refused to consent to a search, but, when Jones first became Defendant's probation officer he may have explained to Defendant that a violation of any of his probation conditions may lead to revocation.

In August or September 1998 Richard Charest became Defendant's new probation officer. Charest made a home visit with Jones in August 1998 and recalls that Defendant was cordial during the visit. Charest reviewed Defendant's file and became aware that Defendant had fallen behind on the counseling payment plan intiated by Jones. As a result, Charest filed a motion to revoke Defendant's probation because of his failure to attend counseling sessions. Upon serving Defendant with the summons and the motion, Charest told Defendant that he had an opportunity to prevent revocation of his probation if he started attending counseling sessions again. At no time did Charest link counseling and revocation with him conducting home visits. However, like Jones, Charest pointed out to

Defendant that a failure to abide by the probation conditions could lead to revocation of his probation.

During the time Charest was Defendant's probation officer he conducted about five home visits. Charest's home visits basically followed the same pattern as Jones's home visits. He would talk to Defendant and then he would ask if he could look around. Often Defendant would accompany him while he was looking around the residence. Charest also noticed that Defendant had a computer. Both Defendant and his roommate, Charles Williams, showed Charest how the computer worked. Defendant never indicated to Charest that he had a problem with Charest looking through his residence. Charest never told Defendant that he would request that his probation be revoked if Defendant refused to allow him to search his residence.

On December 5, 1998, Troy Thornton became Defendant's new probation officer. Thornton had accompanied Charest on two or three home visits and found Defendant to be polite. Thornton never heard from any probation officer that Defendant objected to the searches or to the home visits. Thornton understood that Defendant had a computer and had a concern about Defendant's internet access.

On December 15, 1998, Thornton conducted a home visit with his supervisor, Michael Morin. When Thornton and Morin arrived at Defendant's

residence, both Defendant and his roommate were present. Thornton asked Defendant if he would mind if they looked around. Defendant said he did not mind.

During the search Thornton noticed that Defendant's computer was missing and asked Defendant what happened to it. Defendant told him it was being repaired at a friend's house. Thornton then noticed two boxes of disks either on or near the computer desk and asked Defendant if he could take them back to the office. Defendant said he could take the boxes. Thornton left one box at the residence because Williams told him that one of the boxes belonged to him. Thornton then completed the inspection. At no time did Thornton threaten to revoke Defendant's probation if he did not allow the search or allow them to take the disks.

During the time Thornton was completing the search of Defendant's residence, Defendant asked Morin if he could speak with him outside. Once outside, Defendant told Morin he would find child pornography on the disks.

Thornton and Morin then returned to their offices and in fact, did find child pornography on the disks. Later that evening, Thornton and Morin returned to Defendant's residence with Augusta police officers. Defendant's roommate let the probation and police officers in the residence. Defendant was awakened from

sleep in his bedroom. During this visit, Defendant agreed to sign a consent form for the police to search his residence and for the police to seize his computer.

Charles Williams, Defendant's roommate, was present during most, if not all of the searches conducted by the various probation officers. At the oral hearing Williams stated that at no time did Defendant ever tell Williams to refuse to let the officers into the residence nor did he ever see Defendant demonstrate a reluctance to let the officers in the residence and conduct a search. Further, Williams never heard any officer threaten Defendant with revoking his probation.

ANALYSIS

Defendant argues that the evidence obtained, and statements made by him to Morin on December 15, 1998, should be suppressed because his consent was not voluntary. The crux of Defendant's argument is that he felt compelled to consent to the searches by the probation officers because he believed that if he did not consent his probation would be revoked.

Whether one voluntarily consents to a search "'turns on the assessment of the totality of the circumstances'" *United States v. Forbes*, 181 F.3d 1, 5 (1st Cir. 1999) (quoting *United States v. Barnett*, 989 F.2d 546, 554-55 (1st Cir. 1993)). The court should consider the consenting party's "'age, education, experience, intelligence, and knowledge of the right to withhold consent.'" *Id.* at 5 (quoting

Barnett, 989 F.2d at 555). Other factors to consider are whether the consenting party was advised of his or her constitutional rights and whether the consent was obtained by coercive means. *Id.*

Defendant argues that his consent was obtained by coercive means. To support this assertion he points to statements made by probation officers Jones and Charest that if he failed to abide by the probation conditions his probation would be revoked. The Court is satisfied that those statements could hardly be deemed coercive conduct by the probation officers. In fact, one hopes that every competent probation officer reminds his probationer that a violation of any probation condition could lead to revocation proceedings.

Defendant also contends that Officer Jones told him that if he refused to cooperate and permit the search, he would file a motion to revoke Defendant's probation based on Defendant's failure to meet the counseling condition. First, the Court is satisfied that Officer Jones never made that statement. The Court bases its finding on the oral testimony of Jones and the testimony of Defendant's roommate, Charles Williams, who testified that he was present during most of the searches and never heard any probation officer threaten to revoke Defendant's probation. Second, even if Defendant's contention is true, by the time of the December 15, 1998 search, Officer Charest had filed the motion to revoke his

probation three months earlier. As the government properly points out, the probation officers could not have coerced Defendant to consent to the search by threatening what had already been done three months earlier.

Put simply, looking at the totality of the circumstances, Defendant's assertion that he was subjected to express or implied threats from the probation officers to consent to the searches is unpersuasive. In fact, the testimony at oral hearing by the probation officers and Defendant's roommate support the fact that Defendant was relaxed and cordial during the visits and accompanied the probation officers during the searches. Not once did he state that he felt uncomfortable with the searches to any of the officers. In fact, during the search conducted on December 15, 1998, not only did Defendant consent to the disks being seized by Thornton, he sought out Morin and voluntarily told him that he would find child pornography on the disks. This hardly appears to be someone who felt intimidated by threats and coerced by the officers. It is clear to the Court that the Defendant voluntarily consented to all the searches and that the statements made by the Defendant to Morin were voluntary.

Defendant next contends that the subsequent written consents obtained by the Augusta police department were not voluntary because the consents flowed from the unconstitutional searches conducted by the probation officers. Having

found that the searches by the probation officers were constitutional, Defendant's argument cannot be sustained.

Conclusion

For reasons stated above, I recommend that the Court DENY Defendant's motion to suppress.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Eugene W. Beaulieu
United States Magistrate Judge

Dated on March 3, 2000.